

Matter of Ostrowsky v New York City Bd. of Educ.

2013 NY Slip Op 30455(U)

March 1, 2013

Supreme Court, New York County

Docket Number: 102337/12

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: BARBARA JAFFE
J.S.C. *Jaffe*
Justice

PART 12

Index Number : 102337/2012
OSTROWSKY, ANDREW
vs.
NYC BOARD OF EDUCATION
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 11/27/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for vacate administrative determination

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) 1, 2, 3
Answering Affidavits — Exhibits _____ | No(s) 4, 5
Replying Affidavits _____ | No(s) 6, 7

Upon the foregoing papers, it is ordered that this _____ is

**PETITION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION, ORDER AND JUDGMENT.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 3/1/13

BJ _____, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X

In the Matter of the Application of:
ANDREW OSTROWSKY,

Petitioner,

Index No. 102337/12

Argued: 11/27/12
Motion Seq. No.: 001
Motion Cal. No.: 80

For a Judgment pursuant to Article 78
of the Civil Practice Law and Rules

DECISION & JUDGMENT

-against-

NEW YORK CITY BOARD OF EDUCATION,
DONNA FINN, BOTH INDIVIDUALLY AND IN HER
OFFICIAL CAPACITY AS PRINCIPAL, SOFIA
APOSTOLIDIS, BOTH INDIVIDUALLY AND IN HER
OFFICIAL CAPACITY AS ASSISTANT PRINCIPAL,
INSTRUCTION, BOTH AT FRANK SINATRA
SCHOOL OF THE ARTS,

Respondents.

-----X

BARBARA JAFFE, JSC:

For petitioner:
Joy Hochstadt, Esq., P.C.
300 Central Park West
New York, NY 10024
212-580-9930

For respondent:
Gail M. Mulligan, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-788-8685

By notice of petition and petition dated May 4, 2012, petitioner brings this Article 78 proceeding seeking an order annulling and expunging from his personnel file a formal classroom observation report dated January 27, 2012 and granting him other relief relating to the disciplinary procedures set forth in the collective bargaining agreement (CBA) between the United Federation of Teachers (UFT) and respondent New York City Board of Education (BOE) and in Education Law § 3020-a. Respondents oppose, and by notice of cross-motion dated

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August 14, 2012, move pursuant to CPLR 3212(a)(5), 3212(a)(7), and 7804(f) and 22 NYCRR 130-1.1 for an order dismissing the petition and sanctioning petitioner's counsel. Petitioner opposes and seeks an order sanctioning respondents' counsel.

I. BACKGROUND

A. CBA

Article 21(a) of the CBA between UFT and BOE, entitled "Due Process and Review Procedures," provides, in pertinent part, that

[n]o material derogatory to a teacher's conduct, service, character or personality shall be placed in the files unless the teacher has had an opportunity to read the materials. . . . Members may not grieve material in file The teacher shall have the right to answer any material filed and his/her answer shall be attached to the file copy. . . . If disciplinary charges do not follow, the letter and response shall be removed from the file three years from the date the original material is placed in the file.

(Affirmation of Joy Hochstadt, Esq., dated Sept. 12, 2012 [Hochstadt Aff.], Exh. 21).

B. Observation report

Petitioner, a UFT member, is a tenured mathematics teacher at the Frank Sinatra School of the Arts (FSSA) in Queens. (Pet.). On December 7, 2011, respondent Sofia Apostilidis, assistant principal of instruction at FSSA, observed one of petitioner's classes. (Pet.). On January 27, 2012, Apostilidis issued a written observation report reflecting that she considered petitioner's performance during the lesson to be unsatisfactory because he failed to manage the classroom adequately, listing ways for petitioner to improve his classroom management and instructional skills. (Hochstadt Aff., Exh. 8). On February 13, 2012, petitioner acknowledged receipt of the report and submitted a written rebuttal, which was duly attached. (*Id.*).

On May 4, 2012, petitioner commenced the instant proceeding. (Pet.). On June 12, 2012, petitioner received an unsatisfactory annual performance rating. (Hochstadt Aff., Exh. 23). On

June 30, 2012, respondent Donna Finn, principal of FSSA, changed petitioner's annual rating to satisfactory. (*Id.*, Exh. 33; Affirmation of Gail M. Mulligan, ACC, in Reply, dated Sept. 19, 2012 [Mulligan Reply Aff.], Exh. A).

After the school year ended, petitioner obtained a teaching position at a school in Brooklyn. (Pet. Mem.; Hochstadt Aff., Exh. 32).

By email dated August 21, 2012, petitioner asked Finn to remove the observation report from his file, and by email of the same date, she declined to do so. (Hochstadt Aff., Exh. 34).

II. CONTENTIONS

Petitioner claims that respondents are engaged in a conspiracy to replace tenured teachers with lower-paid, non-tenured teachers. (Pet.). He alleges that Apostilidis targeted him for disciplinary action based on his tenure and salary, and rated him as unsatisfactory with the intent to build a case against him in order to terminate his employment eventually. (*Id.*). He also asserts that tenured teachers have a property interest in their continued employment, that BOE violates their fourteenth amendment due process and equal protection rights in subjecting them to unwarranted disciplinary action, and that placement of the observation report in his file violates his due process rights. (*Id.*).

In opposition, and in support of their cross-motion to dismiss, respondents claim that petitioner has failed to state a cause of action because he lacks standing to challenge the disciplinary procedures set forth in the CBA and Education Law § 3020-a as he has not been subjected to formal disciplinary action. (Resp. Mem. of Law). They also maintain that petitioner may not challenge the observation report as he never grieved it, and thus, has not exhausted his administrative remedies. (*Id.*). In any event, they characterize his petition as voluminous and

difficult to comprehend, and ask that petitioner's counsel be sanctioned for advancing frivolous arguments. (*Id.*).

In reply, and in opposition to the cross-motion, petitioner asserts that Finn, in changing his annual performance rating from unsatisfactory to satisfactory, acknowledged that Apostilidis's observation report was flawed, that he is not challenging the disciplinary procedures set forth in the CBA and Education Law § 3020-a but rather seeks to have them enforced, and that he has been injured insofar as Finn refuses to remove the observation report from his file, and that he has no administrative remedy as the CBA prohibits teachers from grieving materials in their files. (Pet.'s Mem. in Reply and in Opp. to Cross-Motion). He also claims that respondents' counsel, not his own, should be sanctioned. (*Id.*).

In reply, and in sur-reply, respondents observe that even if petitioner had standing to challenge the disciplinary process set forth in the CBA and Education Law § 3020-a, the instant proceeding is moot as his performance was rated satisfactory in his annual review. (Mulligan Reply Aff.).

III. ANALYSIS

A. Claims pertaining to observation report

1. Exhaustion of administrative remedies

With certain exceptions not pertaining here, "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law." (*Lehigh Portland Cement Co. v New York State Dept. of Env'tl. Conservation*, 87 NY2d 136, 140 [1995]; *Sumner v Hogan*, 73 AD3d 618, 619 [1st Dept 2010]). Failure to do so precludes the commencement of an Article 78 proceeding. (*Matter of Connor v Town of Niskayuna*, 82 AD3d 1329 [2d Dept 2011]).

As Article 21(a) of the CBA expressly prohibits teachers from grieving materials placed in their files, petitioner’s failure to grieve the observation report does not bar the instant proceeding.

2. Review of report

Judicial review of an administrative determination is limited to whether it “was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion” (CPLR 7803[3]).

Education Law § 3020-a sets forth the procedures governing the discipline of tenured teachers, providing, in pertinent part, that teachers are entitled to request a hearing when subject to disciplinary action. However, the BOE and teachers’ unions may contract to modify these procedures. (Education Law § 3020[4][a]). As Article 21(a) of the CBA constitutes such a modification, teachers are not entitled to the procedural protections set forth in section 3020-a when materials are placed in their files. (*Matter of Hickey v New York City Dept. of Educ.*, 17 NY3d 729 [2011]).

Here, petitioner viewed and responded to the report before it was placed in his file, and less than three years have elapsed since then. Consequently, there exists no legal basis for ordering the report removed from his file. (*See Matter of Hickey*, 17 NY3d 729 [Article 78 proceeding seeking order compelling school district to expunge disciplinary letters from teachers’ personnel files denied as letters not subject to Education Law § 3020-a procedures]; *Matter of Cohn v Bd. of Educ. of the City School Dist. of the City of New York*, 74 AD3d 457 [1st Dept 2010], *affd* 17 NY3d 729 [same]).

Moreover, even if UFT and BOE had not contractually modified the section 3020-a procedures with respect to materials placed in teachers’ files, as the observation report was

* 7]

evaluative, not disciplinary, in nature, there would still exist no basis for ordering it expunged. (See *Holt v Bd. of Educ. of the Webutuck Centr. School Dist.*, 52 NY2d 625 [1981] [letters to file from school administrator reprimanding tenured teachers for insubordination and violation of school policies, although “sharply critical,” do not constitute disciplinary actions for purpose of section 3020-a as they were written to warn and instruct, not punish, and holding otherwise would frustrate school administration]; *Matter of Grinins v New York City Dept./Bd. of Educ.*, 23 Misc 3d 1117[A], 2009 NY Slip Op 50789[U] [Sup Ct, NY County 2009] [classroom observation reports reflecting that administrator considered teacher’s performance unsatisfactory, containing recommendations for improvement, and warning that teacher could receive unsatisfactory annual performance rating do not constitute disciplinary actions]).

B. Claims pertaining to disciplinary procedures

In order to have standing to challenge a governmental action via an Article 78 proceeding, a petitioner must demonstrate, *inter alia*, “injury in fact,” meaning that [he or she] will actually be harmed by the challenged administrative action.” (*N.Y. State Assoc. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). The injury “must be more than conjectural” and must be personal to petitioner, “distinct from that suffered by the general public.” (*Roberts v Health & Hosps. Corp.*, 87 AD3d 311, 318 [1st Dept 2011]; *Matter of McAllan v New York State Dept. of Health*, 60 AD3d 464, 464 [1st Dept 2009]).

Here, regardless of whether petitioner’s claims are construed to challenge the disciplinary process set forth in the CBA and Education Law § 3020-a or to seek their enforcement, absent any disciplinary action, and as petitioner only speculates that he may be subject to disciplinary action in the future, he has not demonstrated injury sufficient to establish standing. Even if the

filing of the observation report were considered a disciplinary action, as petitioner was able to obtain employment at another high school after it was filed, there is no evidence that he has sustained any injury sufficient to compromise his tenure. To the extent that his claims regarding the disciplinary procedures relate to the harm suffered by other teachers, such injury, likewise, does not provide him with standing.

C. Sanctions

I decline to sanction either party's counsel.

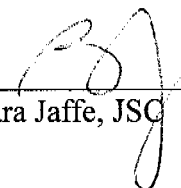
In light of these determinations, the remainder of the parties' contentions need not be addressed.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied in its entirety and the proceeding is dismissed.

ENTER:



Barbara Jaffe, JSC

DATED: March 1, 2013
New York, New York

UNFILED JUDGMENT

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